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Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

October Term, 1999

NORMAN P. KOSTER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a defendant charged with the specific intent crimes of mail fraud and false statements is entitled to a separate jury instruction on his theory of defense, that he acted in good faith which was supported by the record evidence.

PARTIES TO THE PROCEEDING

The parties to the proceedings below were the Petitioner, Norman P. Koster and the Respondents, the United States of America.

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Petitioner, Norman P. Koster, respectfully requests that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at *United States of America v. Norman P. Koster,* 163 F. 3d 1008 (7th Cir. 1998). The opinion of the District Court in *United States v. Norman P. Koster* has not been reported.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on December 16, 1998. No petition for rehearing was filed.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

In 1976, Petitioner, Norman P. Koster (Koster) was involved in the farming business. Koster's farming operation expanded through 1983. To help finance his farming operation, Koster borrowed money from two federal farm agencies, namely, the Farmer's Home Administration and the Commodity Credit Corporation. As a result of the depression in the farm market, Koster defaulted on his loans. Over $1,000,000 was owed by Koster to these agencies.

THE CCC is a government corporation created to finance federal farm programs with money appropriated by Congress. The federal farm programs financed by the CCC are administered by the Agricultural Stabilization and Conservation Service (the "ASCS"), an agency of the United States Department of Agriculture.

ASCS maintained an office in every rural county in the United States. A County Executive Director (CED) was responsible for the daily management of each County ASCS office. The CED was selected and supervised by the County Committee which consisted of three farmers elected by the other farmers in the county. The Set Aside Program is one of the principal programs administered by ASCS. Under the Set Aside Program, a farmer can volunteer not to produce crops on a certain percentage of his land, and in return, that farmer receives financial compensation from the CCC in the form of a "deficiency payment." If enrolled in the Set Aside Program, a farmer may also participate in the Farm Stored Loan Program and receive low-interest loans from the CCC using the farmer's grain crop as collateral.

To participate in the Set Aside Program and the Farm Stored Loan Program, a farmer must complete a series of applications. As part of the application process, each farmer must execute two forms: a contract to participate in the Set Aside Program (the "Contract") and a Farm Operation Plan (the "Plan"). A Contract contains a basic description of a specific farm, including the acreage being

farmed, the crop being grown, and the number of farmers participating and their respective percentage share of the crop--provided that the farmers sharing in the crop are persons qualified to participate in the Set Aside Program.

The Plan requires the farmer to describe the business of the farmer, including the particular land to be farmed; whether the land is owned or leased and if leased, how the lease is paid; the sources of capital and equipment used in the farming operation; and the portion of the labor and management personally provided or hired. On the final page of each Plan, the farmer must certify that all the information in the Plan is accurate. The certification admonishes that "furnishing incorrect information will result in forfeiture of payments and the assessment of a penalty."

Once the farmer submits a Contract and a Plan, the local ASCS office reviews the documents to determine whether that farmer is eligible for the Set Aside and Farm Stored Loan programs. As part of determining whether a particular farmer is eligible, the local ASCS office must conclude that the farmer is "actively engaged in the farming business." If the local ASCS determines that the farmer meets the requirements, then the farmer is enrolled in the Set Aside Program and begins receiving deficiency payments, thus, becoming eligible to apply for Farm Stored Loans.

Deficiency payments are capped at $50,000 per year for each farmer. If it is determined that two or

more farmers are, in fact, the same farmer for purposes of the set Aside program, those farmers are restricted to a single $50,000 deficiency payment. Additionally, the ASCS can withhold deficiency payments and apply them to delinquent debts owed by the farmer to the CCC. This process is known as a "set-off."

The indictment in this case alleged Koster devised a scheme in 1990 to defraud and obtain money and property from the CCC by means of false and fraudulent pretenses, representations and premises. Koster was charged and convicted of mail fraud, submitting false statements, interstate transportation of a security obtained by fraud and money laundering.

Koster, on behalf of 3K Farms, originally applied for the Set Aside Program in 1986 in Lee County, Illinois. The local ASCS determined 3K Farms and Koster were a single entity and offset the debt owed to the CCC. In 1987 and 1988, Koster submitted farm operating plans to the Whiteside County, Illinois ASCS office. These farm operating plans were approved and payments were received. In 1989, a farm operating plan which listed Koster as the farm manager was approved.

The indictment charged that between February, 1990 and March, 1995, Koster engaged in a scheme to obtain deficiency payments and farm stored loans while avoiding set-off by inducing two ineligible individuals, Jerome Lauer and Joe Michlig and one ineligible entity, 4-D Farms, to fraudulently

enroll in the government funded programs and pay him the proceeds received.

The farm operating plan of Jerome Lauer was submitted in 1990. This plan listed Koster as the Farm Manager. This plan was subject to a review by the local ASCS committee. As a result of the request for review, Koster submitted additional documentation which the local ASCS committee approved. In 1991, an update of the previous plan was submitted. Subsequently, a statewide audit of plans, including Lauer's occurred. Koster submitted further documents in response to this statewide audit. Lauer was subsequently deemed ineligible. Lauer unsuccessfully appealed the determination and Sterling Grain and Storage was ultimately approved.

After the disqualification of Lauer, Michlig submitted a farm operating plan. Koster was listed as the farm manager. This farm operating plan was approved. In 1992, the local ASCS required Michlig to submit a new farm operating plan. The local ASCS committee reviewed this plan, required further documentation and ultimately approved the plan. Koster represented Michlig at the review. An update of this same plan was filed in 1993.

At trial, Koster's theory of defense was that he did not engage in any scheme to defraud the ASCS and that the representations made in the Plans and Contracts submitted to the ASCS regarding Lauer, Michlig, and 4-D Farms were made in compliance with regulatory requirements for such plans. Koster also maintained that his actions were taken in good

faith to maintain the viability of his farming operation and in compliance with applicable ASCS requirements and review. Accordingly, at the end of the evidence, Koster tendered two good faith jury instructions to the trial court: one for the false statement charges and the second one for the mail fraud charges. The District Court refused to give either instruction on the basis the Seventh Circuit did not require good faith instructions and that the jury instructions given subsumed and encompassed the good faith defense. Koster was found guilty on all counts.

On appeal, Koster argued that the trial court erred by refusing to instruct the jury on his good faith defense. The Seventh Circuit held that the good faith defense instructions were encompassed in the instructions given to the jury.

The District Court had jurisdiction over Koster pursuant to 15 U.S.C. §714m(a), 18 U.S.C. §§2, 982(b)(1) (A), 1341, 1956(a)(1)(B)(i), 2314, and 3231. The Seventh Circuit Court of Appeals had jurisdiction pursuant to 28 U.S.C. §1291.

REASONS FOR GRANTING THE WRIT

THIS PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEAL ON THE SAME IMPORTANT ISSUE.

The primary authority cited by the Seventh Circuit in *Koster* was *United States v. Schwartz*, 787 F. 2d 257 (7th Cir. 1986). In *Schwartz*, the defendant tendered a separate instruction on good faith as a complete defense. However, in that case, the trial court did instruct the jury "that good faith is a defense to a charge of mail fraud" as part of the specific intent instructions. *Id*. at 265. The Seventh Circuit in *Koster* held that the concept of good faith was contained in the intent instructions even though there was no mention of good faith. *United States v. Koster*, 163 F.3d 1008, 1012 (7th Cir. 1998). Thus, unlike *Schwartz, supra*, there was no mention whatsoever of good faith in any of the instructions given in the instant case. Moreover, the *Koster* panel is clearly in error in its analysis that good faith is somehow subsumed in the concepts of "knowingly" or "willfully". On the contrary, good faith contradicts the specific intent or purpose to bring about a particular unlawful act. Specific intent requires a conscious purpose to do a wrong. *United States v. Blair*, 54 F.3d 639, 642 (10th Cir. 1995). The failure to give the instructions in the instant case misled the jury into believing that they could convict Koster despite his good faith belief that his actions were not designed to avoid any obligation or debt to the Commodity Credit Corporation. Thus, Petitioner

was not fairly given the opportunity in the jury's consideration to rebut the main thrust of the Government's theory of specific intent and criminal liability.

The decision below recognized that Koster had properly raised through evidence the good faith defense. This is not a case where evidence does not exist to warrant the giving of the instruction. This is not a case where the objection is raised as to the exact wording used by the trial court. As the Eighth Circuit held,

> "the question must be whether a Court failed to instruct a jury on the defense of good faith or the defendant's theory of defense and not on an objection to the words actually used." *United States v. Conners,* 894 F. 2d 987, 991 (8th Cir. 1990).

Rather, the issue presented in this Petition is whether a good faith instruction is required and by failing to instruct on good faith did reversible error occur. A defendant is entitled to a charge which precisely and specifically, rather than obliquely or abstractly points to his theory of defense. *United States v. Lewis* , 592 F.2d 1282, 1286 (5th Cir. 1979). Without requiring the giving of a separate good faith instruction the jury would have been misled into believing that the defendant did not have a defense theory of any consequence requiring their serious consideration. This is especially the case where, as here, there is no mention whatsoever in the instructions of "good faith."

The Seventh Circuit Court of Appeals decision in Koster directly conflicts with decisions on the same important issue in the Eighth Circuit Court of Appeals and the Tenth Circuit Court of Appeals. This direct conflict between these Circuit Courts of Appeal merits this Court granting Koster's Petition for Writ of Certiorari pursuant to *Supreme Court Rule 10(a).* When two Courts of Appeal are in conflict on the same issue, this Court should grant certiorari to resolve the conflict. *Waterman S. S. Corp. v. United States,* 381 U.S. 252, 258, 85 S.Ct. 1389, 14 L.Ed. 2d 370 (1965). The importance of a uniform Federal law relating to instructions that play a critical role in determining the guilt or innocence of a criminal defendant, particularly in this era of rather draconian sentences, cannot be overestimated.

The conflict that exists between the Circuits is whether in specific intent crimes such as mail fraud, wire fraud or false statements, is the jury to be instructed that the good faith belief of the defendant is a complete defense. Jury instructions, as this Court is well aware, form the cornerstone of any criminal trial. A defendant is entitled to a jury instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor. *Matthews v. United States,* 485 U.S. 58, 63, 108 S.Ct. 883, 99 L.Ed. 2d 54 (1988).

The Fifth Amendment of the United States Constitution provides "No person shall . . . be deprived of life, liberty or property without due process of law. " *U.S. Constitution Amendment V.*

In criminal proceedings these due process rights require a jury to evaluate the credibility of witnesses, weigh their given testimony and following appropriate jury instructions, to assess the adequacy of a defendant's theory of defense. *United States v. Douglas*, 818 F. 3d 1317, 1322 (7th Cir. 1987). When reviewing jury instructions, it has been consistently held that the instructions are considered as a whole, giving due consideration to the instructions given and the trial record. *Estelle v. McGuire*, 502 U.S. 62, 72, 112 S.Ct. 475, 116 L.Ed. 2d 385 (1991). Failure to give a requested instruction if warranted by the evidence supporting the defendant's theory of defense results in the jury not considering the testimony of the defendant and his theory of defense.

The issues before this Court are that when considering jury instructions as a whole, at least two Circuits have specifically held a jury must be instructed on the good faith belief of a defendant and that failure to instruct is reversible error. Koster, at trial, presented an instruction on good faith, but the trial court refused to instruct under the theory that a specific good faith instruction was not required. The Seventh Circuit Court of Appeals held that was not reversible error.

Koster was charged and convicted of the specific intent crimes of mail fraud and false statements. There exists no dispute among the Circuits that good faith is a complete defense to a specific intent crime. *Sparrow v. United States*, 402 F. 2d 826, 829 (10th Cir. 1968), (good faith complete defense to mail fraud). *United States v. Ammons*,

464 F. 2d 414, 417 (8th Cir. 1972), (good faith complete defense to mail fraud). *United States v. Martin-Trigona,* 684 F. 2d 485, 492, (7th Cir. 1982), (good faith complete defense to mail fraud). *United States v. Fowler,* 735 F. 2d 823, 828 (5th Cir. 1984), (good faith complete defense to mail fraud). *United States v. Bakker,* 925 F. 2d 728, 738 (4th Cir. 1991), (good faith complete defense).

The government in a specific intent case is required to prove beyond a reasonable doubt that the defendant intended to defraud. *United States v. Martin-Trigona,* 684 F. 2d 485, 492, (7th Cir. 1982). Fraudulent intent is an essential element of specific intent crimes. *United States vs. Casperson,* 773 F. 2d 216, 223 (Eighth Cir. 1985). Since Koster was charged with specific intent crimes, at trial the Government had to prove, as an essential element, his fraudulent intent. Koster at trial claimed that his actions were taken in good faith. The trial court refused to instruct the jury on Koster's theory of defense and thus this evidence of good faith could not have been properly evaluated by the jury.

Two Circuit Courts of Appeal have consistently held once a defendant raised good faith as his defense, the jury must be instructed separately on good faith. The Eighth Circuit has consistently and specifically held good faith must be separately instructed to a jury.

In *United States v. Ammons,* 464 F. 2d 414, 417 (8th Cir. 1972), the Court held in a mail fraud case, good faith is a complete defense. In *Ammons,* the

Court specifically instructed the jury that ". . . good faith constitutes a complete defense to one charged with an offense of which fraudulent intent is an essential element." *Id.* at 417. In *United States vs. Casperson,* 773 F. 2d 216 (8th Cir. 1985), the Court found the entire defense was that the alleged fake statements and representations were made with a genuine belief they were true. *Casperson* held, even in reviewing the instructions as a whole, the jury was not directed to the defense of good faith with sufficient specificity to avoid error. *Id.* at 223. Failure to instruct on good faith is reversible error according to the Eighth Circuit. *Id.* at 224.

The Tenth Circuit Court of Appeals has reached the same conclusion. The Tenth Circuit has a long history of dealing with the issue of good faith. As far back as 1967, the Tenth Circuit held good faith is a complete defense to mail fraud and failure to instruct on good faith is reversible error. *Steiger v. United States,* 373 F. 2d 133, 135 (10th Cir. 1967).

The Tenth Circuit has held the defense of good faith is an essential element since it is related to the defendant's objectives and purposes. *Sparrow v. United States,* 402 F. 2d 826, 829 (10th Cir. 1968). *Sparrow* held once good faith is asserted by a defendant, it becomes a necessary issue upon which the defendant is entitled to adequate instructions to the jury. *Id.* at 829.

In *United States v. Hopkins,* 744 F. 2d 716, 717 (10th Cir. 1984), the Court again confronted the issue

of good faith jury instructions. In *Hopkins*, the Court held:

> ". . . a good faith instruction is required to be given as a separate instruction. . . . instructions on willfulness, on aspects of intent, on untruths of representations or fraudulent statements are not sufficient for this purpose."

Id. at 718.

There must be a full and clear submission of the good faith defense as such. *Id.* The Tenth Circuit has not deviated from this rule in subsequent cases. *United States v. Harting*, 879 F. 3d 765, 767 (10th Cir. 1989), *United States v. Mann*, 884 F. 3d 532 (10th Cir. 1989), *United States v. Smith*, 13 F. 3d 1421, 1426 (10th Cir. 1994), *United States v. Grissom*, 44 F. 3d 1507, 1512 (10th Cir. 1995).

The Seventh Circuit, in the opinion below, held that Koster's theory of good faith was contained in the instructions given to the jury. This position has been followed by other Circuits. In *United States vs. McGuire*, 744 F. 3d 1197, 1201-1202 (6th Cir. 1984), the Court held the specific intent instruction adequately conveyed a defendant's theory of good faith. In *United States v. Green*, 745 F. 2d 1205, 1209 (9th Cir. 1984), *cert. denied* , 474 U.S. 925, 88 L.Ed 2d 266, 106 S.Ct. 259, (1985) the Court held a defendant is not entitled to a separate good faith instruction when the Court gives an adequate instruction on specific intent.

The First Circuit has held when a defendant requests a good faith instruction, it suffices if the Court charges clearly on specific intent, thereby transmitting the gist of the request. *New England Enterprises Inc. v. United States,* 400 F. 2d 58, 71 (1st Cir. 1968), *cert. denied* 393 U.S. 1036, 89 S.Ct. 654, 21 L.Ed. 2d 581 (1969). *United States v. Dockray,* 943 F. 2d 152, 154-155 (1st Cir. 1991), (where the Court properly instructs the jury on the element of intent to defraud, ---- essentially the opposite of good faith ---- a separate instruction on good faith is not required). The First Circuit though has not adopted a bright line rule that the giving of a good faith instruction is error. In *United States v. Nivica,* 887 F. 2d 1110, 1124 (1st Cir. 1989), the Court followed the precedent of *New England* but did not assign error to the giving of good faith instructions by the trial court.

The Second Circuit position initially was that an instruction on specific intent is adequate to convey the essence of a good faith defense. *United States v. McElroy,* 910 F. 2d 1016, 1026 (2d Cir. 1990). In *United States v. Doyle, 130 F. 3d 523 (2d Cir. 1997),* the defendant argued for a separate good faith instruction. The trial court gave an instruction on knowing, willful and good faith. *Id.* at 540. *Doyle* held it was not error for the Court to refuse to charge that the Government had the burden to prove bad faith when it had already charged that the Government had to prove willfulness and that good faith was a defense to the willfulness element. *Id.* at 540-541. While the Second Circuit has not held reversible error occurs when no good faith

instruction is given, under *Doyle*, it is clear a good faith instruction should be given.

In the Fifth Circuit, the original rule was that failure to give a good faith instruction was reversible error. *United States v. Fowler*, 735 F. 2d 823, 828-829 (5th Cir. 1984). *Fowler* held the instructions on specific intent did not embody the good faith defense. *Id.* at 828. In *United States v. Hunt*, 794 F. 2d 1095 (5th Cir. 1986), the Court retrenched from the rule outlined in *Fowler*. *Hunt* while not overruling *Fowler*, held the sufficiency of a good faith instruction must be judged by looking at more than just words of the instructions. *Id.* at 1098. *Hunt* held a Court must look to the extent a defendant is able to present his defense to the jury including testimony, closing arguments and the instructions given. *Id.* The Fifth Circuit further defined the issue of good faith instruction in *United States v. Rochester*, 898 F. 2d 971, 978-979 (5th Cir. 1990). In *Rochester*, the Court held " a finding of specific intent to deceive categorically excludes a finding of good faith." *Id.* at 979.

While at first impression it would appear the Fifth Circuit has adopted the majority rule, in fact that is not the case. In *United States v. Jobe*, 101 F. 3d 1046 (5th Cir. 1996), the Court reviewed a case in which a good faith instruction was given. In *Jobe*, the Fifth Circuit held the instruction given on good faith was appropriate since the good faith of any defendant may be considered when adjudicating his criminal intent.

Jobe did not hold the trial court committed error by instructing on good faith. No bright line rule exists in the Fifth Circuit regarding good faith instructions. Rather the holding of *Jobe* is consistent with the theory that a Court must allow a defendant to present his defense of good faith by testimony and even including jury instructions.

The Third Circuit also initially appears to follow the majority position. *United States v. Gross*, 961 F. 2d 1097 (3d Cir. 1992) was a case of first impression for the Court regarding the issue of good faith. *Gross* held that a jury finding of good faith is inconsistent with a finding that a defendant acted knowingly and willfully. *Id.* at 1103. *Gross* held it was not reversible error to fail to give an instruction on good faith. On first blush, it would appear the Third Circuit has also adopted the hard and fast rule that a good faith theory is encompassed in the specific intent instruction. Upon further reading of *Gross*, it becomes apparent, the Court tactfully approves of giving good faith instructions but refuses at this time to find reversible error occurs when no good faith instruction is given. The Court stated:

> "While it was not reversible error for the District Court to refuse to give the good faith instruction in this case, we commend to the district judges in the exercise of their discretion its use as a supplement to the "knowing and willful" charge in future cases."

Id. at 1103.

The Eleventh Circuit has gone back and forth on this issue. In *United States v. Walker*, 26 F. 3d 108 (11th Cir. 1994), the Court held a finding of specific intent to deceive categorically excludes a finding of good faith. No separate good faith instruction was warranted. In *United States v. Morris*, 20 F. 3d 1111 (11th Cir. 1994), the Court was confronted with the failure to give a good faith instruction in a tax fraud case. *Morris* cited *Cheek v. United States*, 498 U.S. 192, 111 S.Ct. 604, 112 L.Ed. 2d 617 (1991), where this Court held a good faith defense exists to the crime of filing fake tax returns and as such serves as the basis for determining the sufficiency of jury instructions. *Id.* at 202. In *Morris*, the Court held the instructions given did not make clear that the good faith belief of the defendant negates the specific intent element of the crime. *United States v. Morris*, 20 F. 3d 1111, 1118 (11th Cir. 1994). *Morris* reversed the conviction of the defendant for the failure to give a good faith instruction. *Id.* at 1118. The Eleventh Circuit, in a mail fraud case, though, held "the trial court's instruction on good faith was an adequate instruction of defendants theory of defense." *United States v. Baker*, 19 F 3d 605, 612 (11th Cir. 1994). It is clear a defendant may, if warranted, have the jury instructed on good faith in the Eleventh Circuit. The Eleventh Circuit has not adopted the position though that reversible error occurs when a jury is not instructed on a defendant's good faith.

This is not the first time this issue has been raised to this Court for resolution. In 1985, this Court denied certiorari when presented with this

same conflict between Circuits over good faith instructions. *United States v. Green,* 745 F. 2d 1205 (9th Cir. 1984), *cert. denied,* 474 U.S. 925, 88 L.Ed. 2d 266, 106 S.Ct. 259 (1985). The denial of certiorari did not resolve this issue. Instead the different circuits have continued to confront this issue. The Eighth and Tenth Circuits have not overruled their precedents. Rather, they have continued to follow their precedent that a good faith instruction is required and failure to instruct is reversible error. Other Circuits, meanwhile, find no good faith instruction is required. Some Circuits have adopted a modification that good faith instructions can be given but it is not reversible error to fail to instruct on good faith. Consequently, a defendant's ability, to argue his theory of good faith defense to a jury will be guided not by the discretion of the trial court, but rather by the geographic location of his crime.

Good faith was never specifically mentioned in the instructions to Koster's jury. Koster's jury was not directed to the defense of good faith with sufficient specificity to avoid error. No full and clear submission of Koster's theory of good faith was submitted to the jury. The jury was left in the dark as to what was the other side of knowingly in the instructions. The theory of the Seventh Circuit that good faith was encompassed in the instructions given directly contradicts decisions on the same issue in other Circuits.

While the holdings of the Eighth and Tenth Circuits are in the minority on this issue, no dispute exists that a clear and definite conflict between

Circuits exists. This conflict impacts the due process rights of a defendant in a criminal case. The impact is best understood when considering the policies underlying the federal criminal system. A most basic policy of the federal criminal system is uniformity. There exists only one federal criminal code. Contrast this with the fifty state criminal codes present in the United States. The one federal criminal code applies to every defendant charged with a crime anywhere in the United States. Clearly the policy of one criminal code is to promote uniformity and consistency.

In the present case, though, the conflict between Circuits on the requirement of a good faith instruction promotes inconsistency. This inconsistency is dramatically illustrated when considering the facts of Koster. Whiteside County, Illinois shares a border with the State of Iowa. The State of Minnesota is northwest of Illinois. If Koster would have lived 40 miles west or northwest, upon being charged as he was in Illinois, his request for good faith instructions under the Eighth Circuit precedent would have been required. If he would have lived even further west in Kansas, under the Tenth Circuit precedent, good faith instructions would have been required. Failing to instruct the jury under Eighth or Tenth Circuit precedent would have resulted in the reversal of Koster's conviction. Koster, however, had the misfortune to live in Illinois, where the Seventh Circuit precedent does not require reversal for failing to instruct a jury on a defendant's theory of defense of good faith.

Consistency in the federal criminal system can also be seen by the implementation of Uniform Sentencing Guidelines. The sentencing guidelines apply to every District Court in the United States. If Koster's crime would have occurred in Iowa, his indictment would have been the same as in Illinois. Upon being found guilty, under the sentencing guidelines, no variance in sentencing would have existed if he was found guilty in Iowa, Illinois or Kansas. The disparity, in Koster's case is between the indictment and sentencing. This conflict between Circuits affected the life, liberty and property rights of Koster. If a defendant is to be uniformly indicted and later uniformly sentenced for his offense, is he not entitled, no matter where the offense occurred, to present his theory of defense, i.e. good faith, to any jury in the United States? Geographic location being the sole determinative factor as to whether a defendant may instruct a jury on good faith promotes disparity, not consistency.

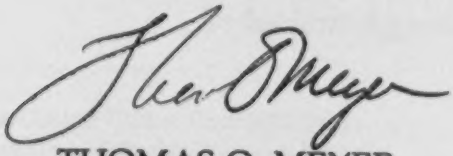
CONCLUSION

Koster was tried and convicted of specific intent offenses. According to the Seventh Circuit Court of Appeals, Koster was not entitled to a separate jury instruction on good faith. Good faith is a complete defense to specific intent offenses. In at least two Circuit Courts of Appeal, a separate instruction to the jury on good faith is required and failure to instruct on good faith is reversible error. The direct conflict that exists between Circuit Courts merits review and resolution

by the Supreme Court. Without review, a defendant's due process rights to present a theory of defense under the Fifth Amendment will continue to be determined by the location of the crime.

Accordingly, the Petitioner, respectfully requests that the Petition for Writ of Certiorari be granted.

Respectfully submitted,



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APPENDIX

Appendix A - Opinion of the United States Court of Appeals for the Seventh Circuit filed December 16, 1998.

In the
United States Court of Appeals
For the Seventh Circuit

No. 98-1695

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

NORMAN KOSTER,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Western Division.
No. 97 CR 50005—**Philip G. Reinhard**, *Judge.*

ARGUED SEPTEMBER 22, 1998—DECIDED DECEMBER 16, 1998

Before BAUER, MANION, and EVANS, *Circuit Judges.*

BAUER, *Circuit Judge.* On January 21, 1997, a federal grand jury returned a thirty-count indictment against Norman Koster, stemming from his scheme to defraud the Commodity Credit Corporation (the "CCC"), a government corporation created to fund various federal farm programs. Specifically, the indictment charged Koster with nine counts of making false statements to the CCC in violation of 15 U.S.C. § 714m(a); ten counts of mail fraud, in violation of 18 U.S.C. § 1341; six counts of money laundering, in violation of 18 U.S.C. § 1956(a)(1)(B)(i); four counts of causing the interstate transportation of a security obtained by fraud, in violation of 18 U.S.C. § 2314; and one count seeking criminal forfeiture of certain property, in violation of 18 U.S.C. § 982(b)(1)(A). Koster's jury trial on

all counts except for the criminal forfeiture count began on October 27, 1997 and lasted seven days. On November 4, the jury returned its verdict, finding Koster guilty on all counts. As to the criminal forfeiture count, Koster waived his right to a jury trial and stipulated to the forfeiture of over $ 700,000.

On appeal, Koster argues that the trial court erred by refusing to instruct the jury on his defense theory that he acted in good faith in compliance with government regulations and relied on the approval of the government. We affirm.

I. BACKGROUND

A. The CCC

The CCC is a government corporation created to finance federal farm programs with monies appropriated by Congress. The federal farm programs financed by the CCC are administered by the Agricultural Stabilization and Conservation Service (the "ASCS"), an agency of the United States Department of Agriculture. The Set Aside Program is one of the principal programs administered by ASCS. Under the Set Aside Program, a farmer can volunteer not to produce crops on a certain percentage of his land, and, in return, that farmer receives financial compensation from the CCC in the form of a "deficiency payment." If enrolled in the Set Aside Program, a farmer also can participate in the Farm Stored Loan Program and receive low-interest loans from the CCC using the farmer's grain crop as collateral.

To participate in the Set Aside Program, and the Farm Stored Loan Program, a farmer must complete a series of applications—which, as it turns out, is the central focus of Koster's conviction. As part of the application process, each farmer must execute two forms: a contract to participate in the Set Aside Program (the "Contract") and a Farm Operating Plan (the "Plan"). A Contract contains a basic description of a specific farm, including the acreage

being farmed, the crop being grown, and the number of farmers participating and their respective percentage share of the crop—provided that the farmers sharing in the crop are persons qualified to participate in the Set Aside Program.

A Plan requires the farmer to describe that farmer's business, including the particular land to be farmed; whether the land is owned or leased; and if leased, how the lease is paid; the sources of capital and equipment used in the farming operation; and the portion of the labor and management personally provided or hired. On the final page of each Plan, the farmer must certify that all the information in the Plan is accurate. The certification admonishes that "furnishing incorrect information will result in forfeiture of payments and the assessment of a penalty."

Once the farmer submits a Contract and a Plan, the ASCS reviews the documents to determine whether that farmer is eligible for the Set Aside and Farm Stored Loan programs. As part of determining whether a particular farmer is eligible, the ASCS must conclude that the farmer is "actively engaged in the farming business." In making this conclusion, the ASCS relies heavily on the farmer's representations in the Contract and the Plan. If the ASCS determines that the farmer meets the requirements then the farmer is enrolled in the Set Aside Program and begins receiving deficiency payments, thus becoming eligible to apply for Farm Stored Loans.

Deficiency payments are capped at $50,000 per year for each farmer. If it is determined that two or more farmers are, in fact, the same farmer for purposes of the Set Aside program, those farmers are restricted to a single $50,000 deficiency payment. Additionally, the ASCS can withhold deficiency payments and apply them to delinquent debts owed by the farmer to the CCC. This process is known as a "set-off."

B. Koster's Attempt to Defraud the CCC

In 1979, Koster began farming in a rural area near Dixon, Illinois. Koster's farming operation consisted of land that he owned and land that he leased. To finance his farming operation, Koster borrowed money from the CCC, totaling approximately one million dollars. In 1984, Koster defaulted on these loans.

The indictment charged that, from approximately February 1990 to March 1995, Koster engaged in a scheme to obtain deficiency payments and Farm Stored Loans while avoiding set-offs by inducing two ineligible individuals, Jerome Lauer and Joseph Michlig, and one ineligible entity, 4-D Farms, Inc., to fraudulently enroll in the government funded programs and pay him the proceeds they received.

Jerome Lauer was Koster's hired hand from mid-1985 through late-1993. Koster paid Lauer cash wages to assist him on portions of his leased farmland. In 1990, however, Koster devised a plan to use Lauer as a straw man to receive additional deficiency payments and Farm Stored Loan disbursements. That same year, Koster personally prepared a Plan and Contract for the 1990 Set Aside Program. Koster had Lauer sign both the Plan and Contract in Lauer's own name and submit the documents to the ASCS office. Relying on the validity of the information submitted in these documents, the ASCS enrolled Lauer in the Set Aside Program and began sending Lauer deficiency payments and Farm Stored Loan disbursements, which Lauer then turned over to Koster.

Had the ASCS known that Koster, and not Lauer, actually was renting the farmland, Lauer would not have qualified as an eligible individual for these government funded programs. Koster resubmitted Plans in Lauer's name, and continued receiving deficiency payments and Farm Stored Loan disbursements for several years.

Joseph Michlig was another straw man Koster used to defraud the ASCS. Michlig worked on Koster's farms from

approximately 1985 to 1988. Between 1989 and 1993, after Michlig no longer worked for Koster, Koster enrolled Michlig in the Set Aside Program and Farm Stored Loan Program. In the Contract and Plan submitted to the ASCS, Koster represented that Michlig was leasing four different farms from three different landowners. In actuality, Michlig did not lease any of this land and thus would not have been eligible for the federally funded programs. Additionally, Koster represented in the Plan that Michlig farmed this land with equipment Koster owned or leased from Michlig's father. In reality, Michlig contributed no equipment, management, or labor to Koster's farming operation during this time frame.

From approximately 1989 to 1990, at Koster's direction, Michlig and his wife received the deficiency payments and Farm Stored Loan disbursements and deposited these funds into a bank account. Michlig and his wife then issued personal checks to Koster in the amounts of the payments. Beginning in 1991, Koster stopped receiving checks from the Michligs and instead directed them to make disbursements to parties Koster specified.

Koster also used 4-D Farms, Inc. as a straw corporation to defraud the CCC. 4-D Farms owned approximately 840 acres of farmland in Whiteside and Lee Counties. Glen Moody, a professional farm manager, acted on behalf of 4-D Farms in negotiating leases. According to Moody, Koster personally leased the 840 acres of land between 1989 and 1993 on a cash-rent basis—meaning that Koster agreed to pay 4-D Farms a specific amount of rent per acre, regardless of whether Koster made a profit from farming that land. Because the land was cash-rented to Koster, 4-D Farms did not meet the requirements for participation in the Set Aside Program. Koster, however, submitted a Plan and Contract to the ASCS, representing that this land was leased to other persons, including Lauer and Michlig. Koster also represented that the land was rented on a crop-share basis, and therefore was

eligible for deficiency payments. Based on these representations, 4-D Farms' application was approved and 4-D Farms was enrolled in the federally funded programs. It received deficiency payments between 1989 and 1993.

At trial, Koster's theory of defense was that he did not engage in any scheme to defraud the ASCS and that all the representations made in the Plans and Contracts submitted to the ASCS regarding Lauer, Michlig, and 4-D Farms were true. Koster also maintained that all his actions were taken in good faith to maintain the viability of his farming operation. Accordingly, at the end of the evidence, Koster tendered two good faith jury instructions to the trial court: one for the false statement charges and the second one for the mail fraud charges. The district court refused to give either instruction. Koster now appeals that decision.

II. Discussion

A defendant is entitled to an instruction on his theory of the case if: 1) the proffered instruction is a correct statement of the law; 2) the theory of defense is supported by the evidence; 3) the theory of defense is not part of the charge; and 4) the failure to include the instruction would deny the defendant a fair trial. *United States v. Wilson*, 134 F.3d 855, 864 (7th Cir. 1998); *United States v. Boykins*, 9 F.3d 1278, 1285 (7th Cir. 1993). In reviewing a district court's decision not to give proposed jury instruction, we consider whether the defendant was prejudiced by the refusal. *United States v. Katalinich*, 113 F. 3d 1475, 1482 (7th Cir. 1997). When the instructions as a whole treat a case fairly and accurately, we will not disturb them on appeal. *Id.* "We defer to the substantial discretion of the district court for the specific wording of the instructions, and in rejecting a proposed instruction, so long as the essential points are covered by the instructions given." *United States v. Scott*, 19 F.3d 1238, 1245 (7th Cir. 1994) (internal quotations omitted).

In the immediate case, we need not discuss all four of the requirements, as set forth in *Wilson*, to determine whether the trial court improperly refused to give Koster's jury instruction. Rather, a discussion of the third and fourth elements leads us to the inescapable conclusion that the trial court properly denied Koster's proposed good faith jury instructions. To prevail on the third element, whether the theory of defense is not already part of the charge, Koster must show that the instructions given did not adequately express his theory of defense. *United States v. Brimberry*, 961 F.2d 1286, 1291 (7th Cir. 1992); *United States v. Douglass*, 818 F.2d 1317, 1320 (7th Cir. 1987).

Here, the district court gave other instructions that contained, in essence, the substance of Koster's proposed good faith instructions. Specifically, the district court gave the following instructions, regarding the multiple charges of mail fraud:

> First, that the defendant *knowingly devised a scheme* to defraud as described in the indictment;
>
> Second, that for the purpose of carrying out the scheme or attempting to do so, the defendant used the United States mails or caused the United States mails to be used in the manner charged in the particular count; and
>
> Third, that the defendant did so *knowingly* and with the *intent to defraud*;
>
> If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.
>
> If, on the other hand, you find from your consideration of all the evidence that any of these propositions has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.

> As used in this case, a scheme means some plan or course of action intended to deceive the Commodity Credit Corporation (CCC) and to deprive it of something of value by means of false pretenses, representations, or promises.
>
> Although it is not necessary that the government prove all of the false pretenses, representations, promises, and acts charged in the portion of the indictment describing the scheme, it is essential that one or more of them be proved beyond a reasonable doubt establishing the existence of the scheme to defraud.
>
> As used in this case, the phrase "intent to defraud" means that the acts charged were done knowingly with the intent to deceive the Commodity Credit Corporation in order to cause the loss of money or a financial gain to the defendant.

Govt. Sug. Jury Instr. No. 18, 21-22 (emphasis supplied). The district court also gave the following instructions regarding the multiple charges of making false statements:

> To establish the offense of making a false statement . . ., the government must prove the following propositions:
>
> First, the defendant made a false statement;
>
> Second, the statement was material;
>
> Third, the statement was made *knowingly*; and
>
> Fourth, the statement was made for the purpose of influencing the Commodity Credit Corporation or for obtaining money disbursed by the Commodity Credit Corporation.
>
> If you find from your consideration of all of the evidence that each of these propositions has been proved beyond a reasonable doubt, then you should find the defendant guilty.
>
> If, on the other hand, you find from your consideration of all the evidence that any of these propositions

> has not been proved beyond a reasonable doubt, then you should find the defendant not guilty.
>
> A statement is false if untrue when made and then known to be untrue by the person making it or causing it to be made.

Govt. Sug. Jury Instr. No. 27-28 (emphasis supplied).

The district court denied both of Koster's good faith defense instructions, concluding that the "knowledge" element of the mail fraud and false statement charges encompassed any good faith defense. We agree with the district court's conclusion. An action taken in good faith is the other side of an action taken knowingly. *United States v. Schwartz*, 787 F.2d 257, 265 (7th Cir. 1986); *cf. Brimberry*, 961 F.2d at 1291 (holding that the district court's instructions requiring the jury to find that the defendant acted "willfully" to convict on income tax evasion necessarily encompassed the defendant's theory on good faith reliance).

On the mail fraud charges, the district court's instructions required the jury to find: 1) that Koster "knowingly devised a scheme" and 2) that Koster acted with "intent to defraud." On the making false statement charges, the instructions required the jury to find that Koster "knowingly" made a false statement. Taking together the jury instructions that were given, the jury could not have found that Koster knowingly committed mail fraud and/or knowingly made false statements to the CCC and yet simultaneously have found that Koster acted in good faith. Thus, even without a separate instruction, we believe that the jury was given a sufficient opportunity to consider whether Koster acted in good faith. *Schwartz*, 787 F.2d at 265. Accordingly, Koster's theory of defense was already part of the district court's charge. And for the same reasons, we also find that the district court's refusal to give Koster's good faith instruction did not deny him a fair trial.

AFFIRMED.

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No. 98-1481

In the Supreme Court of the United States

NORMAN P. KOSTER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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1488

QUESTION PRESENTED

Whether the district court correctly instructed the jury on the mental state necessary to establish that petitioner committed mail fraud and false-statement offenses.

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In the Supreme Court of the United States

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NORMAN P. KOSTER, PETITIONER

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-10) is reported at 163 F.3d 1008.

JURISDICTION

The judgment of the court of appeals was entered on December 16, 1998. The petition for a writ of certiorari was filed on March 15, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner

was convicted on nine counts of making false statements to the Commodity Credit Corporation (15 U.S.C. 714m(a)); on ten counts of mail fraud (18 U.S.C. 1341); on six counts of money laundering (18 U.S.C. 1956(a)(1)(B)(i)); and on four counts of causing the interstate transportation of a security obtained by fraud (18 U.S.C. 2314). The district court sentenced him to a term of 78 months' imprisonment, to be followed by a three-year period of supervised release. In addition, petitioner agreed to forfeit $705,795. Gov't C.A. Br. 2-3. The court of appeals affirmed. Pet. App. 1-10.

1. Between 1990 and 1995, petitioner devised a scheme to defraud the Commodity Credit Corporation (CCC), a government corporation that finances federal farm programs. In that scheme, petitioner helped two individuals and a landlord file forms falsely declaring their eligibility for certain disbursements from the CCC; the money was then funneled back to petitioner. Petitioner used straw men for those transactions because he was so deeply in debt to the CCC that any payment he personally could have earned would have been withheld to reduce that debt. See Pet. App. 2-6.

2. Petitioner's defense at trial was that he had made no misrepresentations to the government. He further contended that all of his actions were taken in good faith to preserve his farming operation. At the close of the evidence, he asked the district court to read the jury two "good faith" instructions: one for the false-statement charges and one for the mail fraud charges.

Pet. App. 6.[1] The district court refused the request because, among other reasons, the mens rea elements of

---

[1] Petitioner's proposed instruction on the false-statement charges would have read, in part:

> The good faith of the defendant is a complete defense to the charge of making false statements * * * because good faith on the part of the defendant is simply inconsistent with a finding of knowingly and willfully making false statements as alleged in the charge.
>
> A person who acts on a belief or an opinion honestly held is not punishable under this statute merely because the belief or opinion turns out to be inaccurate, incorrect or wrong. An honest mistake in judgment does not rise to the level of knowledge and willfulness required by the statute.
>
> The law is intended to subject to criminal punishment only those people who knowingly and willfully attempt to deceive. While the term good faith has no precise definition it means among other things, a belief or opinion honestly held, an absence of malice or ill will and an intention to comply with known legal duties.
>
> * * * * *
>
> The burden of proving good faith does not rest with the defendant because the defendant does not have any obligation to prove anything in the case. It is the government's burden to prove to you beyond a reasonable doubt that the defendant acted knowingly and willfully to make false statements.

Gov't C.A. Br. A1 (quoting Def.'s Proposed Instr. No. 3). Petitioner requested a similar instruction with respect to the mail fraud counts. That instruction would have read, in part:

> The good faith of the defendant is a complete defense to the charge of mail fraud * * * because good faith on the part of the defendant is simply inconsistent with the intent to defraud alleged in that charge. * * * An honest mistake in judgment does not rise to the level of an intent to defraud.

Gov't C.A. Br. A2 (quoting Def.'s Proposed Instr. No. 4).

the mail fraud and false-statement charges encompassed any good faith defense. *Id.* at 6, 9; Gov't C.A. Br. 19. Then, with respect to the mail fraud offense, the court instructed the jury that it could find petitioner guilty only if it found:

> First, that [petitioner] *knowingly devised a scheme* to defraud as described in the indictment;
>
> Second, that for the purpose of carrying out the scheme or attempting to do so, [petitioner] used the United States mails or caused the United States mails to be used in the manner charged in the particular count;
>
> Third, that [petitioner] did so *knowingly* and with the *intent to defraud.*
>
> * * * * *
>
> As used in this case, a scheme means some plan or course of action intended to deceive the Commodity Credit Corporation (CCC) and to deprive it of something of value by means of false pretenses, representations, or promises.
>
> * * * * *
>
> As used in this case, the phrase "intent to defraud" means that the acts charged were done knowingly with the intent to deceive the Commodity Credit Corporation in order to cause the loss of money or a financial gain to the defendant.

Pet. App. 7-8 (emphasis added by court of appeals). And, on the false-statement charges, the court instructed:

> To establish the offense of making a false statement . . ., the government must prove the following propositions:
>
> First, [petitioner] made a false statement;
>
> Second, the statement was material;
>
> Third, the statement was made *knowingly*; and
>
> Fourth, the statement was made for the purpose of influencing the Commodity Credit Corporation or for obtaining money disbursed by the Commodity Credit Corporation.
>
> * * * * *
>
> A statement is false if untrue when made and then known to be untrue by the person making it or causing it to be made.

Id. at 8-9 (emphasis added by court of appeals).

3. The court of appeals affirmed. Pet. App. 1-10. The court first noted that a defendant is entitled to an instruction on his theory of the case if: (1) the tendered instruction is a correct statement of the law; (2) the theory of defense is supported by the evidence; (3) the theory of defense is not part of the charge; and (4) the failure to give the instruction would deprive the defendant of a fair trial. *Id.* at 6 (citing *United States* v. *Wilson*, 134 F.3d 855, 864 (7th Cir.), cert. denied, 119 S. Ct. 216 (1998)). The court then found (*id.* at 7) that consideration of the third and fourth of these elements

led to the conclusion that the district court had properly declined to give petitioner's good faith instructions.

In particular, the court agreed with the district court's conclusion that the mens rea elements of the mail fraud and false-statement charges encompassed any good faith defense. Pet. App. 7, 9. The court observed (*id.* at 9) that the district court's mail fraud instructions required the jury to find that petitioner had "knowingly devised a scheme" to defraud and had acted with an "intent to defraud." It further observed that the false-statement instructions required the jury to find that petitioner had "knowingly" made a false statement. The court thus explained (*ibid.*) that the jury could not have found both that the prosecution had satisfied the mens rea elements set forth in the instructions and that petitioner had nonetheless acted in good faith. Thus, the court concluded (*ibid.*), petitioner's "good faith" defense was logically incorporated within the district court's charge, and the denial of the proposed instructions did not deprive him of a fair trial.

ARGUMENT

1. Petitioner renews his claim (Pet. 7-20) that he was entitled to a "good faith" instruction at trial. That claim lacks merit. In mail fraud prosecutions under 18 U.S.C. 1341, the government must establish, among other things, that the defendant knowingly participated in a scheme to defraud and that he had a specific intent to defraud. See, *e.g.*, *United States* v. *Ruiz*, 105 F.3d 1492, 1501 (1st Cir. 1997); see also *Pereira* v. *United States*, 347 U.S. 1, 8 (1954). In false-statement prosecutions under 15 U.S.C. 714m(a), the government must prove that the defendant made a statement that was false, that he knew the statement was false, and that he made the statement for the purpose of influencing action by

the CCC or obtaining something of value under a statute applicable to the CCC. See, *e.g.*, *United States* v. *Gigot*, 147 F.3d 1193, 1196 n.2 (10th Cir. 1998); *United States* v. *Huntsman*, 959 F.2d 1429, 1437 (8th Cir.), cert. denied, 506 U.S. 870 (1992). Here, the district court fully instructed the jury on the mens rea elements of petitioner's offenses, and petitioner makes no argument to the contrary.

The instructions that petitioner sought would not have presented "good faith" as a separate affirmative defense to the charges against him. In particular, although petitioner now appears to suggest otherwise (Pet. 7; but cf. Pet. 11), those instructions would not have told the jury that, under some definition, "good faith" could somehow entitle him to an acquittal once the elements of the relevant offense had been established. Instead, the requested instructions would have told the jury that "good faith on the part of the defendant is simply inconsistent with the intent to defraud alleged in [the mail fraud] charge[s]" and "simply inconsistent with a finding of knowingly and willfully making false statements as alleged in the [false-statement] charge[s]."[2] Gov't C.A. Br. A1, A2 (quoting Def.'s Proposed Instr. Nos. 3, 4); see note 1, *supra*. Put

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[2] Petitioner's proposed instructions on the false-statement charges made reference to a supposed "willfulness" element. As the prosecution observed at the charge conference, however, "the element of willfulness isn't in this case." Gov't C.A. Br. A4; see 15 U.S.C. 714m(a) (imposing criminal sanctions on "[w]hoever makes any statement knowing it to be false, *or* whoever *willfully* overvalues any security, for the purpose of influencing in any way the action of the [CCC]") (emphasis added). The petition presents no claim that the district court erred by failing to include a "willfulness" instruction or that the absence of such an instruction could itself give rise to any right to a "good faith" instruction.

another way, petitioner asked the district court to repeat, in other phraseology, what it had already told the jury when instructing it on the mens rea elements of these offenses: that it could find petitioner guilty only if it found that those elements were satisfied.

For that reason alone, the district court's refusal to give the proposed instructions was not in error. In instructing the jury on the elements of the offenses (see pp. 4-5, *supra*), the court adequately conveyed to the jury that it was required to acquit petitioner if it accepted the "good faith" theory reflected in the instructions he had proposed. See *United States* v. *Storm*, 36 F.3d 1289, 1294 (5th Cir. 1994), cert. denied, 514 U.S. 1084 (1995); see generally *Cupp* v. *Naughten*, 414 U.S. 141, 147 (1973) (jury instructions must be viewed as a whole). "There is nothing so important about the words 'good faith' that their underlying meaning cannot otherwise be conveyed. Thus, where the court properly instructs the jury on the element of intent to defraud—essentially the opposite of good faith—a separate instruction on good faith is not required." *United States* v. *Dockray*, 943 F.2d 152, 155 (1st Cir. 1991) (internal quotation marks and citation omitted).[3]

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[3] See also *United States* v. *Sarno*, 73 F.3d 1470, 1487 (9th Cir. 1995) (no separate good faith instruction required for false-statement offense under 18 U.S.C. 1014 (Supp. II 1996)), cert. denied, 518 U.S. 1020 (1996); *United States* v. *Mancuso*, 42 F.3d 836, 847 (4th Cir. 1994) ("If the district court gives adequate instruction on specific intent, a separate instruction on good faith is not necessary."); *United States* v. *Walker*, 26 F.3d 108, 110 (11th Cir. 1994) (finding of specific intent to deceive precludes finding of good faith); *United States* v. *McElroy*, 910 F.2d 1016, 1025-1026 (2d Cir. 1990) (where district court instructs on all elements of "knowledge" crime, no reversible error in refusing to instruct on good

2. Petitioner contends (Pet. 11-13) that the Eighth and Tenth Circuits require a separate instruction on good faith in these circumstances and that there is thus a conflict that requires this Court's review. While there is minor disagreement among the circuits, this Court has repeatedly declined requests to resolve it, and it should do so here as well.

The clear majority of circuits have now held that it is not reversible error for a district court to refuse to give a separate instruction on good faith if the other instructions, taken as a whole, adequately convey to the jury the essence of the defendant's good faith defense—for example, by explaining to the jury that the government must prove that the defendant acted with the mens rea applicable to the particular offenses with which he is charged. See *Dockray*, 943 F.2d at 155 (First Circuit); *United States* v. *Gross*, 961 F.2d 1097, 1103 (3d Cir.), cert. denied, 506 U.S. 965 (1992); *United States* v. *Mancuso*, 42 F.3d 836, 847 (4th Cir. 1994); *United States* v. *Walker*, 26 F.3d 108, 110 (11th Cir. 1994); *United States* v. *Gambler*, 662 F.2d 834, 837 (D.C. Cir. 1981). Moreover, the trend in the circuits is clearly away from requiring a separate instruction on good faith. The Fifth Circuit has largely abandoned its previous decision requiring such an instruction. See *Storm*, 36 F.3d at 1294-1295. And the Eighth Circuit, while formally adhering to its position that "a defendant is entitled to a good faith instruction where one has been requested and finds support in the evidence," recently denied

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faith defense); *United States* v. *Rochester*, 898 F.2d 971, 979 (5th Cir. 1990) (jury "finding of specific intent to deceive categorically excludes a finding of good faith") (internal quotation marks omitted); *United States* v. *Schwartz*, 787 F.2d 257, 265 (7th Cir. 1986) ("'Good faith' is just the other side of knowingly making false statements.").

post-conviction relief to a defendant whose counsel had failed to request such an instruction. See *Willis* v. *United States*, 87 F.3d 1004, 1008 (8th Cir. 1996). The court reasoned that the instructions actually given, which "stated that a specific intent to defraud was required," were "adequate to convey to the jury that if it found that [the defendant] acted in good faith it could not find him guilty of bank fraud." *Ibid.*

As petitioner observes, the Tenth Circuit has held that "[t]he 'good faith' instruction is required to be given as a separate subject," even where the instructions otherwise set forth the mens rea elements of the offense. *United States* v. *Hopkins*, 744 F.2d 716, 717-718 (1984) (en banc). Like the Fifth Circuit, however, the Tenth Circuit may reconsider that position. Moreover, as a practical matter, it makes little difference whether a court specifically uses the term "good faith" in its jury instructions. Where, as here, the instructions correctly define the elements of the charged offenses, the absence of a separate good faith instruction should have no effect on any verdict.[4] There is thus no need for this Court to resolve the differences in approach between the court of appeals in this case and the Tenth Circuit in *Hopkins*. Indeed, since *Hopkins*, this Court has denied review in cases raising the same issue that is

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[4] Because the only proper "good faith" instruction in this context would, in effect, inform the jury that it should acquit the defendant if it finds that the relevant mens rea element has not been satisfied, a finding that the mens rea element *has* been satisfied is the functional equivalent of a finding that the defendant did not act in good faith. For that reason, a failure to deliver such an instruction, even if it could somehow be characterized as "error," would always be harmless error so long as the jury was properly instructed on the mens rea element. See *Sullivan* v. *Louisiana*, 508 U.S. 275, 281 (1993).

presented here. See *Bates* v. *United States*, 520 U.S. 1253 (1997) (No. 96-7731); *Von Hoff* v. *United States*, 520 U.S. 1253 (1997) (No. 96-6518); *Gross* v. *United States*, 506 U.S. 965 (1992) (No. 92-205); *Green* v. *United States*, 474 U.S. 925 (1985) (No. 84- 2032).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Supreme Court, U.S.
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No. 98-1481

In the

Supreme Court of the United States

October Term, 1999

NORMAN P. KOSTER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF OF PETITIONER

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QUESTION PRESENTED

Whether a defendant charged with the specific intent crimes of mail fraud and false statements is entitled to a separate jury instruction on his theory of defense, that he acted in good faith which was supported by the record evidence.

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ARGUMENT

The United States, (hereinafter Government), in its brief in opposition, states that the question of good faith instruction is only a minor disagreement among the Circuits. That argument and the Government's statement that the trend among the Circuits to not require a good faith instruction lacks merit. While it is clear this Court has denied Certiorari in several cases since 1985 on this issue, it is also clear the issue has not been resolved between the Circuits. Petitioner has pointed out most Circuits, in fact, have tacitly approved the giving of good faith instructions. (Petitioner's brief p.14-17). Nowhere is this more readily apparent than the decision of Unites States vs. Gross, 961 F. 2d 1097 (3rd Cir. 1992). The Gross Court stated:

> "While it was not reversible error for the District Court to refuse to give the good faith instruction in this case, we commend to the District Judges in the exercise of their discretion its use as a supplement to the "knowing and willful" charge in future cases.
> *Id. at 1103.*

In its brief, the Government has argued by way of example, that the Fifth Circuit has abandoned the requirement of a good faith instruction. (Government brief p. 9). This argument lacks any merit when considering a recent decision of the Fifth Circuit. As Petitioner pointed out in its brief, the Fifth Circuit in 1996 had held an instruction given on good faith was appropriate since the good faith of any defendant

may be considered when adjudicating his criminal intent. United States v. Jobe, 101 F. 3d 1046 (5th Cir. 1996).

Willis v. United States, 87 F. 3d 1004, 1008 (8th Cir. 1996) was also cited by the Government to support its argument. (Government brief p. 9-10). The Eighth Circuit did not state it was abandoning the requirement of a good faith instruction. Willis dealt with the issue of whether failure to proffer a good faith jury instruction was ineffective assistance of counsel.

The Tenth Circuit, the Government argues, may also reconsider its position. (Government brief p. 10). The Government though fails to cite any pending case to support this argument. More importantly, this argument is flawed when considering the position Tenth Circuit has consistently adhered since 1967 of requiring a separate good faith instruction. (Petitioner's brief p. 12-13).

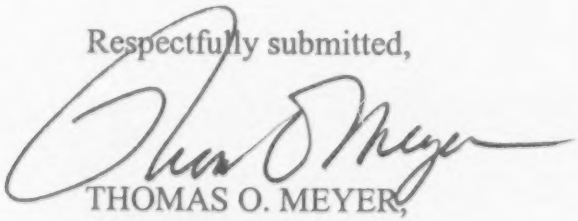
The Government further argues that no error occurred because, contained in the instruction given in the case, was the theory of good faith. (Government brief p. 6-8). This argument, though, ignores the dispute that exists between Circuits. The Tenth Circuit has considered this argument of a defendant's good faith being encompassed within intent instructions. The Tenth Circuit has held repeatedly, "instructions in willfulness, on aspects of intent, in untruths of representations or fraudulent statements are not sufficient to instruct a jury on the good faith belief of a defendant." United States v. Hopkins, 744 F 2d 716, 717 (10th Cir. 1984). The Eighth Circuit has held a jury must be instructed with

sufficient specificity to a defendant's good faith belief to avoid error. United States v. Casperson, 773 F 2d 216 (8th Cir. 1985). Clearly two Circuits have held repeatedly that supplemental instructions on good faith must be give in specific intent crimes. In the present case the District Court should have given the good faith instruction to supplement the instructions given. By instructing the jury on good faith, the jury would have been sufficiently instructed on the good faith defense of the Petitioner.

CONCLUSION

The question presented to this Court for resolution is whether failure to separately instruct on good faith is reversible error. A dispute between Circuits exists on this very issue requiring resolution by this Court. Without resolution by this Court, this issue will continue to be unresolved. For these reasons, this Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,



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